

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
CITIZENS FOR ORDERLY GROWTH,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY, and  
ARMADA/LAGERQUIST COMPANY and  
WINMAR CO., INC.,

Respondents.

PCHB No. 84-311

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

THIS MATTER, the appeal of a flood control zone permit granted by Department of Ecology to Winmar Co., Inc. and Armada/Lagerquist Company, came on for hearing before the Pollution Control Hearings Board; Lawrence J. Faulk, Chairman, Gayle Rothrock and Wick Dufford, Members, convened at Lacey, Washington on February 26, 27, and 28, 1985. Administrative Appeals Judge William A. Harrison presided. Respondent Department of Ecology elected a formal hearing pursuant to RCW 43.21B.230.

1 Appellant was represented by attorneys Keith W. Dearborn and  
2 Alison Moss. Respondent State Department of Ecology was represented  
3 by Allen T. Miller, Jr., Assistant Attorney General. Respondent  
4 Armada/Lagerquist Company and Winmar Co., Inc. were represented by  
5 their attorney John C. McCullough, Jr. Gene Barker provided recording  
6 services.

7 Witnesses were sworn and testified. Exhibits were examined.  
8 Pre-Hearing and Post-Hearing Briefs were filed by counsel the last of  
9 these being received on April 1, 1985. From testimony heard and  
10 exhibits examined, the Pollution Control Hearings Board makes these

#### 11 FINDINGS OF FACT

##### 12 I

13 This matter arises within the broad delta of the Skagit River.

##### 14 II

15 The Skagit River flows westward from its mountain origins and  
16 emerges from the foothills near Sedro Woolley. It then enters the  
17 flat, alluvial fan of its delta, crosses the delta, and empties into  
18 the salt water of Skagit Bay.

##### 19 III

20 The River has crossed its delta by many different routes during  
21 different eras of the past. In modern times, levees were constructed  
22 along its banks.

##### 23 IV

24 The levees of the Skagit River have isolated it from an historical  
25 sub-channel of the River known as Gages Slough. Gages Slough lies

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
PCHB No. 84-311

1 north of the Skagit River and somewhat parallel to it.

2 V

3 The City of Burlington is located on the delta of the Skagit  
4 River, and encompasses much of Gages Slough.

5 VI

6 On August 10, 1984, respondent Armada/Lagerquist Co. and Winmar  
7 Co., Inc. ("Armada") applied to the State Department of Ecology  
8 ("DOE") for a flood control zone permit (RCW 86.16.080) for  
9 construction of a regional shopping center to be known as the Cascade  
10 Mall. The site of the proposed mall is in Burlington adjacent to  
11 Gages Slough, and approximately one mile north of the Skagit River.

12 VII

13 The original application and draft environmental impact statement  
14 set forth a project site which takes in a portion of Gages Slough.  
15 The final application and environmental impact statement show (1) an  
16 excavation of the bank of Gages Slough (but no fill in Gages Slough),  
17 (2) with the Mall set landward of the bank excavation and not in or  
18 over Gages Slough, and (3) a reorientation of the Mall more along a  
19 diagonal axis rather than directly north and south as formerly  
20 proposed. This is the proposal at issue.

21 VIII

22 A flood of a frequency expected to occur, on the average, once  
23 every 100 years ("100 year flood") would discharge 240,000 cubic feet  
24 per second (c.f.s.) onto the Skagit River and its delta. Of this, the  
25 channel between the Skagit River levees would accommodate 130,000 to

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
PCHB No. 84-311

1 150,000 c.f.s. The remaining 90,000 to 110,000 c.f.s. could not b  
2 contained within the levees, and would escape.

3 IX

4 Once the 90,000 to 110,000 c.f.s. escapes the levees, it will move  
5 as sheet flow, meaning a vast expanse of water moving across the delta  
6 at relatively low velocity.

7 X

8 Gages Slough serves to carry away storm water from Burlington, and  
9 discharges it at normal times into the Skagit River (See CPOG v.  
10 Skagit County, SHB No. 84-17 decided May 10, 1985). During the 100  
11 year flood, however, Gages Slough would be overwhelmed, and would not  
12 direct the flow of floodwater. The sheet flow of flood waters may  
13 move perpendicularly to the Slough. Floodwaters outside the Skagit  
14 River levees would probably not rejoin the Skagit River in th  
15 vicinity of Gages Slough during the 100 year flood.

16 XI

17 The sheet flow of floodwaters outside the levees during a 100 year  
18 flood would move, in general, westerly. These floodwaters would cross  
19 the north-south barrier of Interstate Highway 5 (I-5) at low points.  
20 The Mall is proposed for construction adjacent to one of the low  
21 points on I-5.

22 XII

23 The proposed Mall would probably not stop drainage across the  
24 adjacent low point on I-5. Rather, the slow moving waters are likely  
25 to flow around the Mall fill, leaving no adverse effect on drainage

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
PCHB No. 84-311

over I-5.

#### XIII

The proposed Mall fill is not likely to be significantly eroded by the sheet flow of flood waters in a 100 year flood.

#### XIV

We find as fact the following recitation of the Federal Emergency Management Agency, published in its Flood Insurance Study of the City of Burlington (July 3, 1984), and which relates to the delta outside the levees of the Skagit River:

Conventional floodways are not appropriate for the Skagit River delta area for a number of reasons. Although flood elevation and depth criteria can be established for the delta based upon general flood risk assessments which consider possible modes and locations of levee failure in flow path computations, such analyses are not appropriate for establishing floodways on the delta. Unlike typical valley situations, the exact location of flow paths during any particular flood event on the delta cannot be known in advance due to the uncertainty of where levee failures will occur, the relative sequence of levee failures, and the volumes of flow that will result. Likewise, because of the topographic nature of the delta, flooding occurs in sheetflow patterns and no one particular flow path is inherently more efficient than other possible alternatives, making the selection of a floodway location highly arbitrary.

#### XV

Department of Ecology has determined that the "floodway" of the Skagit River downstream of Sedro Woolley is the area of the River and flood plain within the protective levees. Department of Ecology has determined that the "floodway fringe" is the area of floodplain outside the levees. The site of the proposed Mall is in the floodway

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW & ORDER  
PCHB No. 84-311

1 fringe under this determination.

2 XVI

3 Although the evidence is unclear, the Federal Emergency Management  
4 Agency has either abstained from designating a floodway for the Skagit  
5 River downstream of Sedro Woolley or has designated, like DOE, the  
6 areas within the levees of the Skagit River.

7 XVII

8 On October 16, 1984, DOE granted a flood control zone permit to  
9 Armada for the Cascade Mall. The permit was subject to the following  
10 special conditions:

- 11 a. Minimum first floor elevation and all  
12 electrical and furnace firepot shall be at or  
13 above the 100 year frequency flood elevation  
14 of 32.8 feet mean sea level, USGS datum.  
15 b. The mall is to be constructed as shown in the  
16 plan in file.  
17 c. A registered surveyor's benchmark must be  
18 located at the site.

19 Appellants filed its Notice of Appeal to this Board on November  
20 14, 1984.

21 XIX

22 Any Conclusion of Law which should be deemed a Finding of Fact is  
23 hereby adopted as such.

24 From these Findings of Fact, the Board comes to these

25 CONCLUSIONS OF LAW

26 I

27 We review the proposed development for consistency with the State

1 Flood Control Zone Act, chapter 86.16 RCW and rules implementing it  
2 promulgated by DOE as chapter 508-60 WAC.

3 II

4 Respondent, Armada, urges that our review in this matter is  
5 constrained to a search for action by DOE which is "arbitrary and  
6 capricious" or "clearly erroneous" or an "abuse of discretion." We  
7 disagree. Both the standard and scope of our review is de novo. This  
8 is the meaning of WAC 371-08-183 of our rules of procedure and of  
9 chapter 43.21B RCW which confers jurisdiction and procedural  
10 rulemaking authority upon us. See also chapter 34.04 RCW, the state  
11 Administrative Procedure Act, relating to contested cases and San Juan  
12 Co. v. Department of Natural Resources, 28 Wn.App. 796, 626 P.2d 995  
13 (1981).

14 III

15 An appellant bears the burden of proving that a determination by  
16 DOE granting or denying a flood control zone permit was incorrect.  
17 All prior appeals brought before us have been resolved consistently  
18 with this rule.

19 IV

20 The application for the subject permit has not been shown to be  
21 inconsistent with the requirements of WAC 508-60-005, which governs  
22 the contents of applications for permits.

23 V

24 A "floodway" is defined at WAC 508-60-010(2) as:

25 . . . the channel of a water course or drainway and  
26 those portions of the flood plain adjoining the

1 channel which are reasonably required to carry out  
2 and discharge the flood waters of any water course  
or drainway.

3 A "floodway fringe" is defined at WAC 508-60-010(3) as:

4 . . . the area adjoining the floodway which has  
5 been or may hereafter be covered by flood water.

6 A "flood plain" is defined at WAC 508-60-010(4) as:

7 . . . the floodway and the floodway fringe.

8 As can be seen, the flood plain is the sum of the floodway and  
9 floodway fringe.

10 VI

11 The floodplain must be found by the use of the "final determining  
12 factor" at the 100-year flood (or 1% flood). WAC 508-60-030.  
13 However, the "final determining factor" method does not address the  
14 boundary between floodway and floodway fringe. The latter is dependent  
15 upon what is reasonably required to discharge the floodwaters as set  
16 forth at WAC 508-60-010(2), above.

17 VII

18 The delimitation of the floodway requires consideration of the  
19 physical realities of the situation. As long as the area defined is  
20 not over-inclusive under the definition, some leeway in determining  
21 floodway limits is contemplated by the regulation. The basic idea is  
22 that the floodway is to be a predictable path for the discharge of  
23 flood waters of significant velocity. It is, under the regulation,  
24 appropriate to confine the floodway within the area where such  
25 prediction can be made with reasonable assurance. The floodway



determined by DOE to be between the levees of the Skagit River downstream of Sedro Woolley is what is reasonably required to discharge floodwaters of the Skagit River in this case. It is consistent with the definition of floodway set out at WAC 508-60-010(2), above.

#### VIII

Appellant contends that Gages Slough is a floodway under WAC 508-60-010(2). We disagree because it is not "reasonably required" to "discharge floodwaters" as set forth in that regulation. As we have found, Gages Slough does not discharge floodwaters during the 100 year flood event. (See Finding of Fact X, above). This is the event contemplated by the regulations. WAC 508-60-030. The determination by DOE that the floodway in this matter does not extend to or include Gages Slough is consistent with WAC 508-60-010(2) and (3).

#### IX

The proposed Mall would be located within the floodway fringe of the Skagit River. As such it is subject to WAC 508-60-050 which requires:

(1) The structures or works are designed so as not to be appreciably damaged by flood waters;

(2) The structures or works shall be firmly anchored or affixed to prevent dislocation by flood water and subsequent damage to life, health, and property; and

(3) The structures, works, or improvements will not adversely influence the regimen of any body of water by restricting, altering, hindering or increasing the flow of flood waters in the floodway or flood channel expected during a flood up to a magnitude of one hundred year frequency so

1 as to unduly reduce the flood storage capacity of  
2 the floodway fringe.

3 The proposed Mall has not been shown to be inconsistent with WAC  
4 508-60-050.

5 X

6 The proposed Mall is subject to WAC 508-60-060 which provides:

7 The department may as a permit condition  
8 require the flood proofing of any structure or  
9 works constructed, reconstructed or modified upon  
10 the floodway fringe or floodway in order to  
11 minimize damage to life, health or property against  
12 damage by flood water up to the volume of flood  
13 water that could be expected during a flood up to a  
14 magnitude of a one hundred year frequency using the  
15 final determining factor. (Emphasis added).

16 We have found that the subject permit requires, as a condition,  
17 that first floor elevations be above the 100 year flood. (See Finding  
18 of Fact XVII, above). Moreover, we have found that the proposed fil-  
19 for the Mall is not likely to be significantly eroded by the sheet  
20 flow floodwaters of the 100 year flood. (See Finding of Fact XIII,  
21 above). The proposed Mall has not been shown to be inconsistent with  
22 WAC 508-60-060.

23 XI

24 The proposed Mall is subject to WAC 508-60-070 which provides:

25 The department will require that all  
26 structures or works constructed, reconstructed or  
27 modified upon the banks or over in the channel of  
any body of water or drainway allow for the orderly  
flow and removal of all flood waters expected  
during a flood up to a magnitude of a one hundred  
year frequency using the final determining factor.  
(Emphasis added).

1 We have found that the Mall would probably not have an adverse  
2 effect upon drainage of floodwaters over I-5 during the 100 year  
3 flood. (See Finding of Fact XII, above). The proposed Mall has not  
4 been shown to be inconsistent with WAC 508-60-070.

5 XII

6 The proposed Mall has not been shown to be inconsistent with the  
7 Flood Control Zone Act, chapter 86.16 RCW.

8 XIII

9 Appellant has not shown that the proposed Mall is inconsistent  
10 with the State Flood Control Zone Act, chapter 86.16 RCW or rules  
11 implementing it at chapter 508-60 WAC and the flood control zone  
12 permit should be affirmed.

13 XIV

14 Any Finding of Fact which is deemed a Conclusion of Law is hereby  
15 adopted as such.

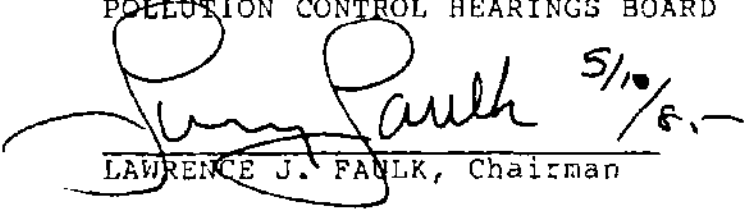
16 From these Conclusions of Law, the Board enters this  
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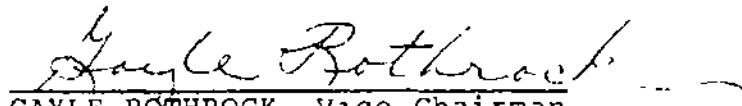
ORDER


The Flood Control Zone Permit (No. 1-5572-7) granted by DOE to Winmar Co., Inc. and Armada Lagerquist Company is hereby affirmed.

DONE at Lacey, Washington this 10th day of May, 1985.

POLLUTION CONTROL HEARINGS BOARD

 5/10/85  
LAWRENCE J. FAULK, Chairman

  
GAYLE ROTHROCK, Vice Chairman

  
WICK DUFFORD, Lawyer Member

  
WILLIAM A. HARRISON,  
Administrative Appeals Judge

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW & ORDER  
PCEB No. 84-311